JULY 3, 1959

THE

SOLICITORS' JOURNAL

VOLUME 103
NUMBER 27

CURRENT TOPICS

Service on Infants

As a general rule, where service of any document in a matrimonial cause is required to be effected on an infant, the document must, unless otherwise directed, be served on the father or guardian of the infant or, if he has no father or guardian, on the person with whom he resides or under whose care he is, but a registrar may order that service made, or to be made, on an infant shall be deemed good service. This rule, which is now contained in r. 66 (3) of the Matrimonial Causes Rules, 1957, was applied by SACHS, J., in *Watts* v. *Watts* (1959), *The Times*, 5th June. A wife's petition for divorce on the ground of her husband's adultery was served upon the woman named by registered post. The woman named who, at the date on which the petition was served, was seventeen years of age, signed and returned the form of acknowledgment of service. The suit was not defended and the wife was granted a decree *nisi*. However, after the granting of this decree and before the making of the decree absolute, it was discovered that the woman named was an infant living in her father's home and, in these circumstances, the petition should have been served on her father. Leave was given to the father to enter an appearance in the suit and he waived any irregularity there had been in the service of the petition upon his daughter. The father said that he did not wish to contest the suit on behalf of his daughter. In the circumstances, Sachs, J., thought it proper to make an order "that service effected . . . on the infant shall be deemed good service" as permitted by r. 66 (3) of the Matrimonial Causes Rules, 1957, and the error was rectified. This decision should be compared with that of STEVENSON, J., in *Roberts* v. *Roberts and Peters* [1959] 1 W.L.R. 663; p. 453, *ante*, where, in similar circumstances, his lordship held that the original trial was completely vitiated by the defect in service and that the petitioner must move a Divisional Court of the Probate, Divorce and Admiralty Division to rescind the decree and to order a rehearing under r. 36 (1) of the 1957 Rules.

Naming Streets

BEFORE any street is given a name, notice of the proposed name must be sent to the urban authority by the person proposing to name the street. The urban authority, within one month of the receipt of such a notice, may, by notice in writing served on the person by whom notice of the proposed name of the street was sent, object to the proposed name, and where an urban authority takes this course, the person proposing to name the street may, within twenty-one days after the service of the notice, appeal against the objection to a petty sessional court. These provisions of s. 17 of the

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Public Health Act, 1925, are relevant to a dispute which has arisen between Belper Rural District Council and a firm of builders. The firm built a new estate and proposed to give twelve roads Cornish names. Two lists of names were submitted but they were rejected because the council thought that the streets in question should be named after trees. In view of this, the builders compiled a list of tree names in Latin but the council found names such as *Quercus* Road equally unacceptable. The builders' next move was to submit a further list of Cornish names but as this, too, was rejected, they have appealed to a magistrates' court which is empowered, by s. 8 of the 1925 Act, to "make such order in the matter as they consider reasonable." It is unlawful to set up in any street an inscription of its name until one month has expired from the giving of notice of the proposed name to the urban authority and, where the authority have objected to the proposed name, unless and until such objection has been withdrawn by the urban authority or over-ruled on appeal. Any person acting in contravention of this provision is liable to a penalty not exceeding five pounds and to a daily penalty not exceeding twenty shillings (s. 17 (3)).

False Pretences

SECTION 32 of the Larceny Act, 1916, provides that: "Every person who by any false pretence . . . with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person" shall be guilty of a misdemeanour. In this connection the expression "chattel, money, or valuable security" does not include things which at common law were not the subject of larceny and, for this reason, the section does not cover the fraudulent obtaining of dogs (*R.* v. *Robinson* (1859), Bell C.C. 34), tame ferrets (*R.* v. *Searing* (1818), R. & R. 351) or accommodation in lodgings (*R.* v. *Bayley* (1923), 17 Cr. App. R. 162), but it may apply to meat and drink supplied to a boarder (*R.* v. *Burton* (1886), 54 L.T. 765). As a general rule, it must be shown that the prisoner fraudulently represented as an existing fact that which is not an existing fact (see, e.g., *R.* v. *Woolley* (1850), 3 Car. & K. 98) and the false pretence may be made by the conduct and the acts of the party (*R.* v. *Barnard* (1837), 7 Car. & P. 784) as well as expressly in words. The Salisbury magistrates were recently confronted with a very unusual case to which these principles would seem to apply. The accused was stated to have complained that he was suffering from a pain in the groin and said that he was in need of medical attention. He was removed to hospital where, it was alleged, it was found that there was nothing wrong with him and he was charged with obtaining food and medicine by a false pretence. The accused pleaded "Not Guilty" and elected to go for trial at quarter sessions. The legal argument in this case could prove to be very interesting.

Police and Motorists

SOME weeks ago Sir JOSEPH SIMPSON, the Metropolitan Police Commissioner, told his men that, wherever possible, they should give friendly yet firm advice to inexperienced, thoughtless and inconsiderate drivers. He did this because he recognises that factors tending to inflame a sense of hostility against the police must be removed if there is to be full co-operation between the public and the police on the roads. It seems that the police in Canada are being asked to follow a similar course. Magistrate A. D. BARRON has advised the chief constables of Ontario to "ruthlessly weed out" conviction-hunters and, at the first annual training seminar of the Ontario Chief Constables Association, he suggested to the chief constables: "Have the speedometers set 5 miles lean on all your cruisers without letting your men know it. Then you should issue instructions that motorists are to be given 3 miles per hour leeway before being stopped. The beefs against your department will drop to nil." It may be that this suggestion goes beyond the measures contemplated by Sir Joseph Simpson, but we are glad that the importance of friendly relations between the police and the motorist is appreciated, both at home and abroad.

The *Locus* in Piracy

WHEN we wrote about the possibility of a prosecution for piracy, arising out of an alleged incident on the Serpentine in Hyde Park ("Piracy on the Serpentine?" p. 396, *ante*), we said that the jurisdiction of the Court of Admiralty and the term the "high seas" does not include "creeks and arms of the sea within the body of a county" and mentioned that the Bristol Channel has been held to be such a creek and arm. In support of this statement we cited *R.* v. *Cunningham* (1859), 28 L.J.M.C. 66, where Cockburn, L.J., asserted that the whole of the Bristol Channel between the counties of Somerset and Glamorgan should be regarded as being within the bodies of the counties by the shores of which it is bounded. However, one of our readers has pointed out that this assertion may well be too wide. In *The Fagernes* [1927] P. 311 it was decided that a place 10½ or 12½ miles distant from the English coast and 9½ or 7½ miles from the Welsh coast was not within the jurisdiction of the High Court and the Secretary of State for Home Affairs did not claim that this spot was "within the limits to which the territorial sovereignty of His Majesty extends." Bankes, L.J., distinguished *Cunningham's* case as there the place in question was within the Port of Cardiff, between an island which was part of the parish of Cardiff and the Welsh shore and only 3 miles from that shore. The width of the Bristol Channel at that point is about 10 miles. His lordship thought that Cockburn, L.J., had not intended to lay down a general rule applicable to all parts of the Bristol Channel but, as Atkin, L.J., reminded the court, Lundy Island, 20 miles to the westward of the *locus in quo* in *The Fagernes*, *supra*, is part of the body of Devonshire. This fact was confirmed in *Harman* v. *Bolt* (1931), 47 T.L.R. 219. In a paper entitled "Piracy in Modern International Law," read by Mr. D. H. N. JOHNSON at the University of Birmingham in 1957 (recently published in the report of the Grotius Society for that year), it was concluded that piracy must "be committed on the High Seas or at any rate in a place outside the jurisdiction of any State." In view of this, and in the light of the decision of the Court of Appeal in *The Fagernes*, *supra*, it would seem that piracy may be committed in the Bristol Channel in places which are not within the territorial sovereignty of the QUEEN.

Turnips Beware!

THE Statute Law Revision Bill, now before Parliament, provides, *inter alia*, for the repeal of the Stealing of Vegetables Act, 1772, being an "Act . . . for the more effectually preventing the stealing or destroying of Turnips, Potatoes, Cabbages, Parsnips, Pease and Carrots."

"LE CRIME PASSIONEL"

By P. A. G. RAWLINSON, Q.C., M.P.

THE mind at once leaps to drama, to an extravagant picture of a tragic person in the dock, dwarfed by guards with curling moustaches; to a story of passion and pathos, of betrayed lovers or wronged wives, of human frailty and of very dramatic death. While there, one finger aloft and his gown billowing out behind him, stands the Great Advocate, dominating the court, cowing the prosecutor and hypnotising the jury into returning a verdict contrary to all canons of any known law! But quite apart from the fact that there is no really appropriate English translation, the whole conception of *le crime passionel* smacks of exotic continental jurisprudence alien to the subtle and methodical balances and processes of English law. Thus, to the distinguished figures ruminating before the fire of the Garrick Club or sipping coffee in Chancery Lane, the thought that any such development was creeping into English law, like banjo housing development encroaching on to a green belt, that a human being who kills because he is so transported by anguish or love or other emotion should be somehow less culpable in law, must be alarming and abhorrent. But what, in fact, is the present trend abroad and at home? On the Continent, where the romantic conception of *le crime passionel* was shared at the end of the nineteenth century by the first scientific theories relating to the subject, it appears that the modern trend is to circumscribe the admission of extenuating circumstances in favour of the "passionate" offender rather than to broaden the ground of exemption or attenuation. As M. Marc Ancel, a judge of the Supreme Court of France, has written, the number of *crimes passionels* has substantially declined, and the number of acquittals or too lenient sentences has considerably decreased since 1945. M. Ancel attributed this to the admission of women to sit on the jury and women have shown themselves inclined to be more severe than men; the decline of the romance of passion; and the fact that Parisian juries have had before their eyes since 1940 infinitely greater disasters. Yet in England certain changes in the law of murder have recently been made, widening the scope and range of defence and enlarging the province of the jury in judging the extent of passion and its effect on loss of self-control.

Previously little scope for passionate excuses

For in the past, be the story ever so tragic and lovers ever so star-crossed or so betrayed, the power of the jury, when deciding upon the culpability of a man charged with murder who tried to excuse the killing by claiming that he was provoked, was severely limited. Except for the reasonably unlikely chance of one spouse catching another precisely *in flagrante delicto*, the jury were directed that where a person was killed by a deadly weapon mere words or gestures were not enough to reduce the offence from murder to manslaughter. Although it might be thought that words and gestures could in many circumstances provoke a man to rages of passion and loss of self-control, nevertheless the judge had to withdraw the question of provocation from the jury where words alone were relied upon as constituting provocation, save in circumstances of a most extreme and exceptional nature. Moreover, the fact that the person provoked was highly excitable or particularly irascible or suffered from some physical or mental peculiarity could not, and cannot still, be pleaded as an especial excuse for lack of self-control. For in deciding whether the provocation was such as to make a man through passion lose his self-control and whether in fact he did so lose his self-control in consequence of such passion caused by such provocation, the test of the provocation and its effect is that of what can be reasonably expected in such circumstances of the reasonable man—that controversial character who must travel on an omnibus, who takes the magazines at home and pushes the lawn mower in his shirt sleeves, the normal dredger owner, who is always male and never female, who possesses the "agility of an acrobat and the foresight of an Hebrew prophet," and whose qualities and tastes, or lack of them, have played such a dominating part in determining how an Englishman should react and what he may or may not do with impunity. But not even that "ideal *vir constans*" was expected to retain his self-control when catching his wife in the act of adultery, and the chink in the rule was this admission that there did exist in human affairs a certain circumstance which could understandably drive men beyond their normal self-control and so render their reaction less culpable. But this remained an exception, and as Lord Simon made clear in *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588, the mere confession of adultery was not sufficient. Taunting or gloating or brandishing the fact in words which might often prove more provocative even than a sudden, if unlikely, discovery, was not provocation sufficient to reduce the crime. To paraphrase Lord Simon's well-known illustration, the only possible defence of Othello would have been to publish the circumstances of his crime for the urgent attention of the Home Secretary after the trial.

Homicide Act, 1957

Until 1957, the classic direction given to juries in cases in which the sympathy of everyone was with the accused, where, in fact, the crime arose from passion or from pathos, was that given by Devlin, J., in *R.* v. *Duffy* [1949] 1 All E.R. 932. For he then defined provocation as "an act or series of acts done by the dead man to the accused which would cause in any reasonable person and actually caused in the accused a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind." But in 1957 the Homicide Act, which is a piece of legislation for which I bear about 1/350th part of responsibility, and which I found recently when debating in Cambridge was universally hated and scorned even more than Dr. Johnson hated and scorned cant or the Whigs, altered the law. It provided, in s. 3, that on a charge of murder where there is evidence on which the jury can find that the accused was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury. So the standard of the reasonable man, not the excitable, the irascible, the peculiar nor the particular, remains; but the jury are now permitted to consider things done, things said, or both together. In this sense the issue of provocation is very much at large. What, then, of the English crime of passion or provocation?

Recent cases

Recently a husband was acquitted of the murder of his wife's lover and sentenced to a term of imprisonment for manslaughter. His defence was one of provocation and

involved recounting the general circumstances of his life and the conduct and words of the man he killed. Because of the 1957 Act, the jury were permitted to consider everything done and everything said, and if they accepted the evidence as to what was said and done, to decide the effect which that would have had, in their opinion, upon a reasonable man. Although the husband had purchased a revolver and sought out the appointment with the lover, the jury, after listening to the whole story of the relationship of the parties concerned in the tragedy, and of what the husband had said and done and what was said and done to him, acquitted him of murder, and the prosecution, upon whom rests the burden to prove the absence of provocation, decided not to challenge the defence of provocation. In another recent case a mistress, learning that her lover was not to marry her, stabbed him to death. Again, after hearing the defence, the jury acquitted the woman of murder and convicted her of manslaughter. Of course, each particular case involves its own particular circumstances, but since 1957 this widening of the province of the jury in cases of this kind, so that they are now permitted and entitled to take into account broader and wider considerations, has surely prised open this branch of the criminal law so as to provide these ordinary, everyday, judges of the fact with greater opportunity of deciding for themselves the degree of blame which should rest upon the killer of another human being. In 1955 Mr. Melford Stevenson, Q.C. (now Mr. Justice Stevenson), for the defence of Ruth Ellis, was unable to address the jury after Mr. Justice Havers had ruled that there was not sufficient material even on a view of the evidence most favourable to the accused to support the verdict of manslaughter on the ground of provocation. That might not have been the case to-day, for although Ruth Ellis may have had "time to cool" from the time when she placed the revolver in her handbag, travelling thereafter several miles to Tanza Road, and the time when she eventually shot David Blakely, it could be (although I express no opinion as to the probability) that the jury might have found that the "things done" by David Blakely previously and at Tanza Road by going to and coming from the public-house, by seeing her and by turning away from her, combined with things previously said, did amount to provocation, and that in such circumstances Ruth Ellis was not guilty of murder but guilty of manslaughter. If s. 3 of the 1957 Act had then been law, might not Ruth Ellis have put in evidence before the jury, for them to believe or disbelieve, things said and things done which could have reduced the degree of culpability? For it is surely now open to anyone accused of murder to lay before a jury a wretched and possibly tragic recital of circumstances which preceded the killing. So a balance has shifted from the judge of the law to the judges of the fact, and with that shift of balance a greater opportunity is presented to the advocate. Madam Fahmy, with her husband crouching before her ready to spring like an animal, was acquitted of murder when her defence was self-defence. If she was tried to-day would the alternative be other than manslaughter? When Marshall Hall defended her, would he have not been more confident if, for his second barrel, he could have relied upon s. 3 of the Homicide Act, 1957?

Greater power for the jury

Thus it appears that this modern English legislation has given greater power to the jury at a time when juries, apart from the war years, have never played so little part in civil law. They can be flattered, as they are properly flattered, by both judges and counsel, but they will surely take this new opportunity and use it sensibly, humanely and justly. So, for all that, *le crime passionel* still remains inexorably alien, a colourful and romantic conception. While the arts of the Great Advocate associated with crimes of passion must yet be left in the capable hands of Mr. Charles Laughton and Mr. Michael Dennison.

THE TAKER TOOK

THE injustice of this world must have been sadly apparent to those who read the report of *Lyle & Scott, Ltd.* v. *Scott's Trustees* (1959), *The Times*, 19th June; p. 507, *ante*. A certain Mr. Hugh Fraser had conceived the idea that it would be of advantage to the shareholders of the company if he were to acquire 75 per cent. of the ordinary shares. One difficulty was that the company was a private company, and its articles contained restrictions on transfer. Although in Scots form, the article in question seems to have been very similar to one in common use in this country; it gave existing members a right of pre-emption over the shares, and any shareholder "who is desirous of transferring his ordinary shares shall inform the secretary in writing."

The mistake-over

In order to overcome this obstacle to the accomplishment of his benevolent intentions, Mr. Fraser proceeded in the following way. The complaisant shareholders received the take-over price for their shares in exchange for duly executed transfers and a general proxy. The bidder thus thought to obtain control of the company without the tiresome formality of registering the transfers, and who knew but that the company in the fulness of time might decide to alter its articles and appoint more amiable directors? But this was where he made his mistake-over. The House of Lords decided that the company was entitled to a declarator (which is no doubt Scots for a declaration) that the shareholders who had transacted business with Mr. Fraser were bound to implement the articles by giving notice to the secretary, thus setting in motion the machinery for purchase of their shares by other members.

Revision of Stock Exchange rules?

An argument that the shareholders were no longer *desirous* of transferring their shares, because they had already done all that was asked of them, found no favour with the House, nor did an even more abstruse argument that the articles only applied to a desire to transfer in general, not to a particular desire to transfer to a certain person at a certain price.

The decision is a useful one for the interpretation of common form transfer clauses, and confirms the general view that a private company with these clauses in its articles has considerable defences against the take-over bidder. It remains to be seen whether public companies can persuade the Stock Exchange to permit the adoption of similar restrictions.

J. P. L.

Common Law Commentary

SERVANT OR INDEPENDENT CONTRACTOR

THERE have been many decisions over the years on the problem of deciding whether a person is the servant of another or an independent contractor. It is often said that the question is a question of fact unless one is construing a statute, but the truth appears to be that it is always a question of inference from facts, plus, where a statute is involved, the construction of the statute: the latter point is a question of law in the sense that it is a question for the judge.

The way in which the necessary inference is drawn is to put the facts to the test of whether they indicate that the person in question may be told not only what to do but how to do it, and it matters not that he is a skilled person who is subjected to orders, nor that the person giving the orders may himself not be skilled.

Relevant facts

Facts which may be relevant are (*a*) master's power of selection of his servant; (*b*) payment of wages; (*c*) control over the work; (*d*) rights of suspension or dismissal; (*e*) who pays National Health Insurance; (*f*) method of tax assessment.

Herbert v. *Harold Shaw, Ltd.*

In *Herbert* v. *Harold Shaw, Ltd.* [1959] 2 W.L.R. 681; p. 372, *ante*, the Court of Appeal had to consider the case of a plaintiff who was a skilled roofer and was paid wages by the defendant. He had worked exclusively for the defendant for several years. But for National Insurance purposes he was treated as a self-employed person, he employed an assistant (though he charged the wages to the defendant), and for tax purposes he was assessed under Schedule D.

The mere fact that he was paid wages by the hour, or by piece-work (both systems had been used), is not enough to say that he was the servant of the defendant. Most of the other factors pointed to his being an independent contractor, although he had to borrow ladders and the like and only supplied hand tools. If I buy paint and ask someone to paint my house and he asks to be paid by the hour, that does not make him my servant, and the question who supplies a ladder will hardly turn the scales.

In this particular case the plaintiff claimed damages for injury caused by his slipping off a roof of the defendants on which he was working. Among other things he claimed that there had been a breach of the Building (Safety, Health and Welfare) Regulations, 1948, in that there was a failure to provide proper equipment. In fact, the judge of first instance found no such breach.

Meaning of "workman"

In the Court of Appeal the point raised was that no sufficient attention had been given to the meaning of "workman" as defined in the Employers and Workmen Act, 1875, which includes not only persons engaged under a contract of service but also those under "a contract personally to execute any work or labour." But the Building Regulations are made under the Factories Acts and they do not refer to the Employers and Workmen Act. Consequently the definition was irrelevant.

This was in many ways an unusual case in that it is uncommon for an independent contractor not to supply all the equipment he needs and to charge a figure representing "wages". The plaintiff seems to have assumed that it was sufficient that he was "employed" by the defendants—whether as independent contractor or not—for the purposes of the regulations, possibly in the light of the Employers and Workmen Act. If there was, as appears possible, an admission that the plaintiff was or might be an independent contractor (but in the latter case "employed" nevertheless), such a claim could not be got on its feet without a statutory foundation.

L. W. M.

"THE SOLICITORS' JOURNAL," 2nd JULY, 1859

ON the 2nd July, 1859, THE SOLICITORS' JOURNAL wrote of the position and prospects of solicitors in New Zealand that "any young, enterprising solicitor, especially with a little capital, will find the colony an excellent field for professional advancement, and that without the hindrances, partly from competition, and partly from colonial regulations, which now exist in Canada and most of our Australian settlements. A solicitor emigrating to New Zealand should take with him his letters of admission which (with the payment of a small fee) will at once entitle him to practise. Practice of all kinds will be open to him in the colony, there being no distinction observed between the two branches of the profession, and we need hardly say that success is most easily obtained by the well-educated versatile man, apt at different branches of the law and ready to turn his hand to anything, whether as an advocate or in the office. To such the colony offers the advantages of an excellent climate, light taxation and rapidly growing wealth, together with society far superior to that generally found in Australia.

Wills and Bequests

Mr. HENRY ALLAN APPLETON, solicitor, of Wigan, left £45,228 net.

Mr. HARRY COPLEY, solicitor, of St. Ives, Huntingdon, left £25,856 net.

Mr. W. B. FORSHAW, solicitor, of Warrington, left £27,535 net.

Mr. WILLIAM HARTLEY, chief clerk for Eastwood & Co., solicitors, of Todmorden, left £1,395 net.

Mr. WILLIAM CHARLES HOWARD, solicitor, of Spilsby, left £37,054 net.

Mr. W. A. KAY, solicitor, of York, left £77,188 net.

Mr. E. A. RAM, solicitor, of Great Bookham, Surrey, left £24,376 net.

Mr. J. B. SPARKE, solicitor, of Ninfield, Sussex, left £116,073 net.

Tax Planning in Perspective

THE NEW BOSTON TEA PARTY—VI

COVENANTS AND WILLS

MR. JONES has some calls on his money outside his immediate family. He has been making voluntary allowances to various people, and he feels bound in honour to continue them. He will be better off if he binds himself in law as well.

There are subscriptions to charities adding up to £150 per annum, an allowance of £100 to a less successful brother towards the education of his son, and £120 for an elderly lady in a remote degree of consanguinity. This calls for three deeds of covenant effective under s. 392 of the Income Tax Act, 1952, to transfer income from Mr. Jones to the beneficiaries.

(1) *Charities*

Take a suitable trustee, say the accountant. Execute a seven-year covenant to pay him £150 gross each year. Declare that the payments are to be held on discretionary trusts for strictly charitable purposes. Deduct tax at the standard rate and put this back in your own pocket. Result: the trustee will distribute the money among selected charities who will reclaim all the tax deducted. Saving: £58 2s. 6d. each year.

Section 415 of the Income Tax Act, 1952, prevents this type of covenant from saving surtax, because it is not in favour of a named individual for his own use.

(2) *Nephew's education*

If the boy has no other income, a covenant in his favour will be better than a covenant with the father. The boy can receive £100 per annum without his father losing the child allowance, and the income tax deducted from the £100 can all be reclaimed. The gross payment is a deduction from Mr. Jones' total income for surtax. Saving:—

	£	s.
Income tax	38	15
Surtax (top slice at present 6s. 6d.)	32	10
	£71	5

(3) *Elderly relative*

Miss Jones has only £260 a year of her own, and although her exact age is unknown it is over sixty-five. This means that an addition of £150 to her income would be taxed at well below the standard rate. Two-ninths would be deducted for age relief, and the rest would bear the reduced rate of 4s. 3d. in the pound. In fact a covenant by Mr. Jones to pay her £150 gross will give her rather more than the voluntary allowance of £120, while it will cost Mr. Jones only £44 after deducting income tax and allowing for the reduction in his surtax. Saving: £76.

For the cost of three deeds of covenant, which will only be stamped 5s. each if the payments are weekly, Mr. Jones has saved a total of £206 a year on his payments of £370, and no one any the worse for it, except the rest of the taxpayers. If he had not been a surtax payer he would still have saved £124.

The will

In past generations a will was the most important document a Jones of Barset ever signed in his life, and the signing was an occasion of solemnity and even pomp. Not so with our Mr. Jones, who has done so much by *inter vivos* disposition that the will becomes just one of a series of documents. As a matter of fact Mr. Jones has by now very little left to dispose of. There is the agricultural land, his shares in the property company and the house, but his real wealth has become less tangible; it consists of his service agreement with the Barset Printing Co., Ltd., his insurances and the discretion vested in the trustees of his settlement. Although his free estate may increase again before he dies, when it comes to will-making Mr. Jones' problems are not very different from those of many testators.

There are important discretions to exercise under the will and the most suitable trustees will be ourselves and the accountant. Among other good reasons, we are already trustees of the settlement, under which similar discretions arise and call for a co-ordinated policy.

The trusts of the will provide for Mrs. Jones in two stages. To avoid a second payment of estate duty on her death, we take the fullest possible advantage of the surviving spouse exemption by giving her only a life interest in residue. At the same time, the income of the estate may not be enough for her needs, and the trustees should have power to release capital to her at discretion. If she were "competent to dispose" of the capital, the benefit of the surviving spouse exemption would be lost, but the trustee's power to release capital does not make her competent. If she had been a trustee herself, it would have been essential to prevent the power being exercised at a time when she happened to be sole trustee, but it was simpler and safer for her not to be a trustee at all.

As for income tax and surtax, the advances made by the trustees will not be taxable in Mrs. Jones' hands, so long as the power is carefully drawn and sensibly exercised. What the draftsman has to avoid is any reference to making up the income of the widow or providing for her living expenses; what the trustees must avoid is a regular recurrence of payments, even if the amounts vary. If these two fences are neatly jumped, Mrs. Jones cannot be taxed just because she does in fact use the capital advanced to supplement her income.

The better part of valour

After tying up the estate during Mr. Jones' lifetime, purely to take advantage of the surviving spouse exemption, we aim at the maximum elasticity in benefiting the children. After her death, the residue will be held by the trustees on a discretionary trust to appoint the capital to any children or issue born within the perpetuity period. Until appointment the income can be applied at discretion for the same people. It will be useful for the trustees to have power to accumulate income for twenty-one years after Mr. Jones' death, which is one of the accumulation periods available in the case of a will; may be there will be no income to spare but if there is, an accumulation will be an excellent way of saving surtax which the beneficiaries might otherwise be paying.

So we leave Mr. Jones, poorer than he was, his fortune dissipated, no longer master of his business or in his own house, the future of his family uncertain, dependent on

others and out of his control. Under pressure of taxation we have betrayed every principle the family solicitor used to stand for.

The more ambitious schemes of Mr. Jones have depended on capital he could alienate and income from which he could abstain. Subtract these schemes and there remains tax planning as it is today for the ordinary man, an occasional opportunity for marginal saving. Just as redistribution of capital among the family is the key to estate duty saving, so the key to tax saving is redistribution of income, taking maximum advantage of reduced rates and allowances, and in particular of that most valuable of concessions, earned income relief.

(*Concluded*) PHILIP LAWTON.

SNAP JUDGMENTS IN THE CHANCERY DIVISION

ONE of the principal functions of the Chancery Division is to provide the kind of relief that cannot be obtained *ex parte* by default. Entering judgment in default of appearance or of defence is a form of procedure which is usually associated with the Queen's Bench Division. At first sight it may seem rather difficult to fit what is, after all, a common-law mode of procedure into the elaborate machinery of the Chancery Registrar's Office. Consequently entering judgment by default in this division has acquired an air of mystery which is quite unwarranted.

The circumstances in which a plaintiff may enter judgment *ex parte* are (1) when no appearance has been entered, (2) when an appearance has been entered but no defence has been delivered, and (3) when the defence has been struck out. A defendant may enter judgment *ex parte* (though strictly speaking this is not a judgment by default) for his taxed costs after he has been served with notice of discontinuance under Ord. 26, r. 3, of the Rules of the Supreme Court. Final judgment can be entered for a liquidated sum or for recovery of possession of land, and an interlocutory judgment can be entered for damages to be assessed or for the return of goods or their value to be assessed. The purpose of this article is to draw attention only to those aspects of the procedure which give rise to most difficulty in the Chancery Division. It is certainly not an attempt to paraphrase Ord. 13 (default of appearance) and Ord. 27 (default of pleading).

Liquidated sums

When the amount claimed is a liquidated sum the plaintiff is not entitled to enter judgment without leave (*a*) if the money is due under a mortgage (Ord. 13, r. 17, and Ord. 27, r. 17), or (b) if the money is due to a moneylender or his assignee (Ord. 13, r. 2, and Ord. 27, r. 2). So far as mortgages are concerned the rules are widely framed and cover "any relief of the nature or kind specified in Ord. 55, r. 5A," which includes almost every remedy open to a mortgagee. Although the plaintiff is not required, either by Ord. 13, r. 3, or by Ord. 27, r. 2, to certify that the action is not one to which Ord. 13, r. 17, or Ord. 27, r. 17 (as the case may be), applies, the registrar may, if he is of opinion that the endorsement on the writ or statement of claim leaves the matter in any doubt, require to be satisfied on this point or decline to enter the judgment.

Under Ord. 13, r. 3, the plaintiff may include in the judgment interest to the date of judgment, provided that it has been claimed in the writ, either under a contract, express or implied, or under a statute, e.g., Bills of Exchange Act, 1882. The rate will be that specified in the writ, or if no rate is mentioned, 5 per cent. per annum. Order 27, r. 2, does not mention interest specifically but refers to "the amount claimed," but these words have always been considered wide enough to include interest. If the calculation is at all complicated the solicitors should produce a statement of figures for checking in the registrar's office. (These remarks apply equally to calculations of mesne profits mentioned below.) It is, perhaps, hardly necessary to add that if judgment is entered for more than is actually due at the date of entry, the defendant may have it set aside.

Possession of land

Judgments for recovery of possession of land can raise a difficulty, though one of less importance than formerly, namely, the application of the Rent Acts. In *Smith* v. *Poulter* [1947] K.B. 339, Denning, J. (as he then was), pointed out that in the case of controlled property there is no power to give judgment for possession "unless the court considers it reasonable" to do so. He went on to say: "It is desirable, therefore, that in actions in the High Court for possession of a dwelling-house, the indorsement of the writ should state either the reason why the house is not within the Rent Restrictions Acts, or if it is within those Acts, what is the ground on which possession is sought." If this recommendation is not followed, and the indorsement of the writ or the statement of claim gives rise to a suspicion that the property is within the Acts, the registrar will decline to enter the judgment.

As in the case of a liquidated sum, judgment cannot be entered under Ord. 13 or Ord. 27 for recovery of possession of land if the plaintiff's claim arises under a mortgage. Both Ord. 13, r. 8, and Ord. 27, r. 7, provide that if the claim is for possession of land the plaintiff's solicitors must produce a certificate that the action is not one to which r. 17 of Ord. 13 or Ord. 27 (as the case may be) applies, before judgment can be entered. This certificate should be indorsed on one copy of the judgment.

The plaintiff may include in the judgment mesne profits as well as arrears of rent if these have been claimed in the writ (Ord. 13, r. 9, and Ord. 27, r. 8). If the mesne profits cannot be calculated the judgment will be for "mesne profits to be assessed," and the plaintiff will have to take the judgment to the master's chambers and apply for an appointment for that purpose. But if the amount of the rent is stated in the writ and mesne profits are claimed at the same rate, the amount can be entered in the judgment. Mesne profits run from the date of termination of the tenancy, but if the claim is based on breach of one of the covenants in the lease, the issue of the writ operates as the determination of the tenancy by the landlord, and mesne profits can be calculated from that date (*Elliott* v. *Boynton* [1924] 1 Ch. 236). If the tenancy has already been determined by the landlord before the issue of the writ the date of such determination is the date from which mesne profits should be calculated.

If the indorsement on the writ does not describe the land sufficiently to enable it to be identified, judgment cannot be entered in default of appearance. The plaintiff should in such circumstances file a statement of claim in default of appearance (in which the land will be properly described), and then proceed under Ord. 27, r. 7, in default of defence.

Costs

Where the plaintiff has recovered a liquidated sum the amount of the costs will usually be inserted in the judgment. These will be in accordance with the fixed scales of costs allowed in the Queen's Bench Division set out at the end of the Practice Master's notes following Appendix N in the Annual Practice. In other cases the judgment should order the costs to be taxed. When the judgment is for recovery of possession of land alone no costs are allowed if the defendant is in default of appearance. It is otherwise when the defendant has appeared but has failed to deliver a defence. However, if there is a claim for arrears of rent or mesne profits or damages, in addition to the claim for possession of land, the plaintiff is entitled to his taxed costs even in default of appearance. It is the practice in such cases to allow the ordinary High Court costs even though the amount recovered may be less than £75. Before leaving the subject of costs, it should be remembered that it is not the practice in the Chancery Division to allow a plaintiff to enter judgment for costs alone where the claim has been satisfied out of court before appearance. In such a case the plaintiff should apply by summons in chambers for an order as to his costs.

Form of order

The forms of order used in the Chancery Division are those set out in Appendix F to the Rules of the Supreme Court, with the addition of Group A or B (as the case may be) in the title. The name of the registrar need not be inserted. In actions brought in this division it usually happens that a claim for which judgment can be entered in default is coupled with a claim for an injunction or other equitable relief. If the plaintiff wishes to enter judgment by default, he can only do so by abandoning his other claims. In such a case the following recital may be inserted in the judgment, "and the plaintiff having abandoned his claim for [an injunction] it is adjudged, etc." These words are not essential and the registrar would not refuse to enter a judgment from which they had been omitted. In an action in which the defence has been struck out the judgment will begin: "The defence having been struck out by Order dated . . . it is adjudged, etc.," instead of "The defendant not having delivered any defence . . ."

Requirements on entering judgment

In all cases two copies of the judgment are required. (No fees are payable provided that the writ was issued after 1st March, 1958.) If more than a year has elapsed since service of the writ or delivery of the statement of claim, one month's notice of intention to proceed should have been served on the defendant. If the defendant is in default of appearance an office copy notice filed in default should be produced. If he is in default of defence a copy of the notice and accompanying letter will probably be sufficient evidence.

In default of appearance the original writ (with the certificate of service indorsed) and a certificate of non-appearance (based on the form set out in the notes to Ord. 13, r. 15, in the Annual Practice) are required. This certificate should bear the same date as the judgment, for the mere fact that a defendant is out of time for entering an appearance is no bar to his doing so at any time before judgment is entered. Strictly speaking the affidavit of service of the writ should be produced as well, but as this has to be filed in the central office before the certificate of non-appearance is issued, the latter is usually regarded as sufficient nowadays.

If the defendant is in default of defence, the original writ, the certificate of appearance and a copy of the statement of claim (if not indorsed on the writ) should be produced. The statement of claim or (if this is included in the writ) the writ itself should bear a certificate of the plaintiff's solicitors that no defence has been delivered. If the defence has been ordered to be struck out, that order must be produced as well.

When judgment is entered for costs against a plaintiff who has served notice of discontinuance, and has failed to pay these costs within four days after taxation, the documents required are two forms of judgment (Form No. 14, App. F), a copy of the writ and statement of claim (if any), the notice of discontinuance and the taxing master's certificate.

Solicitors should first make inquiries of the registrars' clerks (Room 180 or 188), who will direct them to the principal clerk. He will examine the judgment and other relevant documents, and if everything is in order he will mark both copies of the judgment as having been examined. The solicitors should then take the documents to any registrar in chambers who will pass the judgment, which can be entered immediately. The sealed duplicate is issued free of charge.

M. B.

COLONIAL APPOINTMENTS

The following promotions and appointments are announced in the Colonial Legal Service: Mr. I. V. AVNI, Magistrate, Cyprus, to be District Judge, Cyprus; Mr. J. E. R. CANDAPPA to be Crown Counsel, Sierra Leone; Mr. J. E. DARGAN to be Magistrate, Hong Kong; Mr. A. G. GILMAN, Deputy Clerk of the Courts, Jamaica, to be Clerk of the Courts, Jamaica; Mr. J. H. G. GLOVER, Solicitor-General, Mauritius, to be Puisne Judge, Mauritius; Mr. J. R. GREGG, Puisne Judge, Hong Kong, to be Senior Puisne Judge, Hong Kong; Mr. R. D. GREY to be Crown Counsel, Aden; Mr. S. E. HERMAN to be Resident Magistrate, Nyasaland; and Mr. I. DE C. ROWE, Deputy Clerk of the Courts of Jamaica, to be Clerk of the Courts, Jamaica.

LIABILITY FOR CIVIL WRONGS BETWEEN SPOUSES

The Association of Liberal Lawyers has been asked by the Lord Chancellor to consider whether any alterations are desirable in the law relating to the liability in tort of one spouse to the other. This matter is now under consideration by members of the Association.

THE SOLICITORS ACT, 1957

On 23rd April, 1959, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that the name of EGON WERNER LEWINSOHN, of 253 Grand Buildings, Trafalgar Square, London, W.C.2, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the complainant his costs of and incidental to the application and inquiry. The order became operative on 16th June, 1959.

THE SOLICITORS' MANAGING CLERKS' ASSOCIATION: CERTIFICATE OF PROFICIENCY

The Association's courses of instruction for solicitors' junior clerks, which will precede the examinations for the certificate of proficiency, will be held in Michaelmas and Hilary Terms, 1959 and 1960, respectively. Particulars of the courses, which will be held in the Lord Chief Justice's Court at the Law Courts, will be available by about the middle of July. Application for admission should be made early at the offices of the Association at Maltravers House, Arundel Street, Strand, W.C.2.

Landlord and Tenant Notebook

DAMAGES FOR BREACH OF COVENANT FOR TITLE

WHEN, in *Rhyl Urban District Council* v. *Rhyl Amusements, Ltd.* [1959] 1 W.L.R. 465; p. 327, *ante*, Harman, J., held that the defendants' counter-claim for breach of covenant of title was time-barred, he briefly touched upon the question whether such a claim was maintainable at all and indicated that he favoured the view expressed by Channell, J., in *Corporation of Canterbury* v. *Cooper* (1909), 100 L.T. 597. Channell, J., as mentioned in my article on Implied Covenant for Title (p. 483, *ante*), somewhat hesitatingly came to the conclusion that there was such a cause of action; but in the case before him, the defendant had made no such claim, so the statement is likewise an *obiter dictum*. In neither case was it necessary to consider what would have been the measure of the damages if the claim could have been entertained. That question is, in my submission, not an easy one.

The rule

It is well established that in general all a plaintiff can recover is a sum representing the cost of investigating title, plus any deposit paid and interest thereon. The leading cases are *Flureau* v. *Thornhill* (1776), 2 Wm. Bl. 1078, and *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158. In the first, Blackstone, J., reasoned that such contracts contained an implied condition that the vendor had a good title; his brother De Grey, C.J., appears to have considered that causation was a factor, opining that, in the absence of fraud, the purchaser could not be entitled to any damages for the fancied goodness of the bargain which he supposed he had lost. In *Bain* v. *Fothergill* (*supra*) Lord Hatherley said categorically: "It is recognised on all hands that the purchaser . . . is not held to be entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title." In *Day* v. *Singleton* [1899] 2 Ch. 320 (C.A.), Lindley, M.R., called this rule "an anomalous rule based upon and justified by the difficulties in showing title to real property in this country."

Fraud

De Grey, C. J., recognised that fraud would make a difference. But it is important that decisions have shown that when an intending tenant or purchaser recovers damages in such cases, it has been damages for deceit and not for breach of covenant of title. It may not have been put that way in *Hopkins* v. *Grazebrook* (1826), 6 B. & C. 31, in which a vendor who had no title at all but hoped to obtain one in time was held liable for damages for loss sustained by the purchaser; or in *Robinson* v. *Harman* (1848), 1 Exch. 850, in which that decision was followed; but the authority of *Richardson* v. *Sylvester* (1873), L.R. 9 Q.B. 34, points to the conclusion suggested, especially as there was no contract and no use of the word "demise" in that case (a condition precedent, as mentioned in the "Notebook" for 19th June, p. 484, *ante*, to a claim for damages for breach of implied covenant for title). The defendant had advertised that he would let certain farms. He had no power to let them and knew that he had no such power. The plaintiff claimed damages for his trouble and pains and the expense incurred in inspecting one of the farms. It was held that he had a cause of action; and not long afterwards, Lord Hatherley, in his speech in *Bain* v. *Fothergill* to which I have referred, explicitly laid it down that in such circumstances damages were to be awarded for deceit, not for breach of contract.

Ultra vires

The opinion tentatively expressed by Channell, J., in *Corporation of Canterbury* v. *Cooper* (*supra*)—that a binding compromise "may have included a contract by the corporation . . . to grant an effectual lease . . . therefore there may have been a contract to procure the consent of the Local Government Board . . . She ought to have claimed damages for not getting the valid lease . . ."—can hardly be reconciled with *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519, in which specific performance of a covenant for renewal (at the same rent), in a lease granted under a power, was refused: the power was conferred by a private Act of Parliament, stipulated that the best rent should be reserved, and during the original thirty years' term the development of the neighbourhood (near the Thames at Lambeth) had brought about a considerable increase in the value of the property. "It seems to me," said Kay, J., "that a man who, with his eyes open, enters into a contract with a person who has a leasing power to take a lease at a future time at a certain rent must be taken to know that such a contract is subject, from the very first moment it is entered into, to this possible infirmity, that when the time comes the rent may not be the best rent, and that the contract cannot be carried out; but would that involve the trustee who enters into that contract in a liability for personal damages? I have listened in vain for authority in favour of that proposition; but there is authority against it, namely, the case of *Bain* v. *Fothergill*."

This suggests that Channell, J.'s sympathy for the aged defendant in the *Canterbury* case may have been well deserved, but that he would have been bound to dismiss the counter-claim which he thought she might have made; and that the same would have applied to the counter-claim in the *Rhyl Urban District Council* case if it had been brought in time.

Refusal of consent

However, when the difficulty is not that of the absence of some consent required by statute, but due to the failure to obtain the consent of a private individual, it may be found that *Bain* v. *Fothergill* (*supra*) will not apply. In the *Canterbury* case, Channell, J., drew an analogy between the position of the disappointed lessee and that of the purchaser of a lease: ". . . just as a contract to assign a lease includes the consent of the lessor where it is wanted." The position is, I have tried to show, not as simple as all that. In the above-mentioned case of *Day* v. *Singleton*—which Channell, J., may have had in mind—an intending assignee did succeed in obtaining damages from the vendor. Examination of the facts suggests that damages were held to be payable essentially because, for reasons connected with his own private advantage, the intending assignor had not seriously sought the consent, and had in fact all but asked the lessor to refuse it. Lindley, M.R.'s view was that the "anomalous rule" ought not to be extended to cases in which the reasons on which it is based do not apply; and it did not apply to a case in which a vendor could make good title but would not, or would not do what he could in order to obtain one.

More recently, *Bain* v. *Fothergill* (*supra*) was held not to apply to a case of inability due to a vendor not being sufficiently well off to satisfy a mortgagee's requirements. This was in *Re Daniel*; *Daniel* v. *Vassall* [1917] 2 Ch. 405. The "would not" was purely due to the circumstance that the mortgage covered other property; the vendor might be said to have done all he could to complete, but had not succeeded in obtaining the expected co-operation of the mortgagees. Sargant, J., held that the case was not one of a defect of title within the exact terms of the *Flureau* v. *Thornhill* decision, cited Lindley, M.R.'s judgment in *Day* v. *Singleton* on not extending *Bain* v. *Fothergill*, pointed out that in that case Lord Hatherley had also referred to a vendor's duty to do all that he could to complete the conveyance, and held that, whether there was any question of bad faith (as in *Day* v. *Singleton*) or not, pecuniary inability formed no better defence than it ordinarily did to a claim for breach of contract.

Restrictive covenants

In the last-mentioned case, Sargant, J., approached the *Bain* v. *Fothergill* rule as if it were an exception, and rightly so; as Lindley, M.R., had put it in *Day* v. *Singleton*: "The damage to him [the aggrieved party] is occasioned by his not obtaining what he was entitled to by his contract; and so far as damages are concerned the reason why he fails to obtain what he bargained for is immaterial. The damage is the same whatever the reason may be. Why, then, should he obtain more damages if no attempt is made to obtain the lessors' consent than he would be entitled to . . . ?", etc.; and answered the question by explaining that the anomaly was due to the difficulties of showing a good title.

Whether it be a rule or an exception, its strength was again illustrated in a landlord-and-tenant case, *J. W. Cafés, Ltd.* v. *Brownlow Trust, Ltd.* [1950] 1 All E.R. 894. Mesne lessors had agreed to grant an underlease of a shop with a tenant's covenant not to use the premises for the business of an estate agent. It was then found that the ground lease contained far more restrictive covenants, designed, as Lord Goddard, C.J., put it, to enable each lessee to enjoy a quasi-monopoly in his trade for the duration of the lease. During the negotiations the mesne lessors had said (in answer to the usual enquiry) that there were no restrictive covenants affecting the land, but, counsel having advised them that there were, they refused to complete. In a short but pithy judgment, the learned lord chief justice held that the case was not comparable to *Re Daniel* (*supra*) in which the difficulty was one which could have been removed by payment of money, and fell well within the rule laid down in *Flureau* v. *Thornhill* (*supra*), discussed at length in *Bain* v. *Fothergill* (*supra*). Nor was there any fraud. Damages must, therefore, be limited to return of deposit, interest thereon, and costs of investigating title.

R. B.

Country Practice

FAILURE OF A MISSION

If you look at a coloured map showing the density of population, you will notice some blobs of white to indicate where population is extremely sparse. A fraction of an inch from such a blob—ten miles as the crow flies—you will find our office. You may, if you act for a feeding stuffs or fertiliser manufacturer, sometimes send us a writ for service on a farmer. Very, very occasionally this takes me away and up to the almost uninhabited hinterland.

The road narrows as it climbs into the heather. Gates have to be opened and closed, water-splashes navigated and, in the latter stages, pot-holes have to be looked for and avoided. The road descends to a hidden valley. Here are lost little farmhouses with boarded windows, and a derelict Methodist chapel. One or two larger farmhouses remain, one with a paraffin-driven television set. There the road gives up completely, ending up in the farmyard with nowhere else to go. From there the process server must continue on foot up a muddy, rocky track.

Here was evidence of decay. Gates no longer swung on their hinges; walls and fences soundlessly uttered the word "dilapidations" in the ear of anyone familiar with agricultural arbitrations.

Then I came upon the farmstead. An elderly horse, in need of a haircut, stood idle in the paddock. The farmyard was littered with scrap metal and other rubbish. Some nondescript hens panicked at my appearance, but a muscovy duck (of all things) had a good look at me. I knocked at the door, and waited. The windows were curtainless, but in each was a geranium (all right, then, pelargonium), hopelessly scraggy and overgrown.

After a time I walked round to the back of the little farmhouse. Next year, or the year after, it will just be one bed of nettles; but there, blazing at me from the patch of garden, were Russell lupins, pæonies and roses struggling above the weeds. It was then that a solemn youth appeared, and from him I learnt that his father was away, and would not be back until late that night. I exchanged civilities with the boy, but I knew then that the influence that had tended the garden and pruned the geraniums, and fed the poultry, and kept the home bright and her men happy, was now only a memory.

I shall call again next week.

"Highfield".

Personal Notes

Mr. G. Day Adams, solicitor, of Leicester, has resigned from the chairmanship of W. & E. Turner, Ltd., multiple footwear distributors. He has held the position for eighteen years and will now remain on the board.

Richard Barker & Son, solicitors, of Melton Mowbray, Leicestershire, will be incorporated into the firm, Oldham, Marsh & Son, solicitors, also of Melton Mowbray, in September.

Mr. Desmond Heap, LL.M., the Comptroller and City Solicitor of the Corporation of London and a member of the Council of The Law Society, has been invited by the Government of Trinidad and Tobago to advise them on the framing of legislation to control the use of land in the Colony. He is due at Trinidad on 4th July.

Mr. James Martin Parker, solicitor, of Epsom, was married to Miss Janet Frances Jackson on 6th June.

HERE AND THERE

ENGLISH GOES WEST

IT was 31st July, 1969, and Justice Harry B. Vaisey, now by far the senior judge of the Supreme Court of the State of Britain, was in the act of delivering judgment in the case of *Re Brass (deceased)*. Two years previously, when the British Legislature had unanimously voted in favour of the proposal that Britain should become an overseas member of the United States of America, the judge had been urgently dissuaded from retiring, because his long-standing mastery of that branch of the English tongue known as " the President's American " constituted him an essential link between the two systems of jurisprudence then about to be fused. This linguistic accomplishment, so unusual among old-fashioned lawyers, had first been revealed, to the astonishment and delight of the legal profession, in a most learned article in *The Times* on 20th June, 1959. In the years that had followed his Honour had become even more brilliantly bilingual. The case now before the court had attracted considerable attention. The janitors had with difficulty succeeded in closing the doors. The stenographers were ready. The attorneys' benches were crowded. The judge rapped sharply with his gavel to command silence. Many of the audience respectfully stubbed out their cigarettes.

A SENSATIONAL CLAIM

THE plaintiff was Jeremy Bentham Brass, a native of Birmingham and for forty years an active member of the Chalkmarkers' Union. Under the Inheritance (Family Provision) Act he was making a claim against the estate of his deceased wife Polly Brass. The lady was a native of Central Europe, but, thanks to her outstanding personal charms and her temperamental talent as an actress, she had found her way to Hollywood, assumed American citizenship and a stage name and became known to millions of picture-goers as Polly Game. Before her union with Mr. Brass she had been through several ceremonies of marriage and divorce in places as widely separated as Reno and San Marino. A Moslem oil potentate, an American screw and bolt millionaire, an English " take-over bid " expert (who took her over), a Greek shipowner, a Highland chieftain domiciled in Bermuda and a fugitive Chinese diplomat who " chose freedom " were among her previous husbands. She met Mr. Brass while playing Rosalind as a guest artiste at Stratford-on-Avon ; her legs were excellent. (Owing to a clerical error his union had bought a block of a hundred seats for " As You Like It " in mistake for " My Fair Lady "). After a week's acquaintance Polly married him on the urgent advice of her psychiatrist who said she needed " a new psychological experience." She got it. In the late nineteen-sixties it was almost impossible even for the very rich to obtain any form of private domestic service. Mr. Brass, true to his lifelong principles, only consented to do jobs about his wife's luxurious Hollywood home or to drive her automobile for her on condition that she paid him union rates. When she died suddenly on a journey to Nevada it was found that she had left him nothing at all in her will. His claim under the Inheritance (Family Provision) Act was disputed by her executors on behalf of several interested parties. They disputed it, first on the merits, and, secondly, on the ground that, for several complicated reasons arising out of the speed with which her successive marriages had been contracted and her divorces arranged, she had never been validly married to Mr. Brass at all.

THE PRESIDENT'S AMERICAN

THE brilliant judgment of His Honour on the points of law will, of course, be found recorded in the law reports [1969] 3 Ch. 222, but it is his mastery of the American language which concerns us here. " I have sure listened with care," he said, " to the testimony of more than fifty witnesses and some of them were kind of delicate about feeding me the truth. But I have got them straight and, by cracky, I kind of figured the plaintiff's attorneys were a shyster outfit. Scarcely was the cadaver of his wife in the hands of the morticians when they commenced this action. By the testimony of those who knew her best she was a doggone pesky little hound. (I use the expression in accordance with modern usage in its most complimentary sense.) Sure it got the plaintiff sore that there were no dollars for him in her will, but it gives you a slant on the sort of guy he was, the way he held out for his union rates, and can you wonder she got hopping mad all over ? He was no boob when he married that honey-baby and I guess he could spiel a lot of mushy stuff." His Honour, having considered the law, gave judgment for the defendants on all points and immediately the court went into recess and the vacation began with the singing of " My country, 'tis of thee," which conveniently went to the tune of the old British national anthem. His Honour left the courthouse thoughtfully, passed along the sidewalk by the " Stars and Stripes " drug store formerly the " Seven Stars," crossed New Square, Lincoln's Inn, now, of course, dominated by an enormous statue of Abraham Lincoln. He went up the steps, along the terrace and into the Benchers' private room. In its discreet seclusion he was able to return (not without considerable relief) to that now almost forgotten idiom once known as " the Queen's English " before the English language went west.

RICHARD ROE.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal"]

Generic Term for Hovercraft

Sir,—Referring to the Current Topic in your issue of 19th June, craft of the design developed by Saunders-Roe Aircraft Company could well be called " Skimcraft," large ones being " skim-ships " and small ones " skim-boats."

After all they neither progress *on* water or land nor do they fly in the accepted term.

CLEMENT F. WEBB.

London, E.C.2.

Sir,—Perhaps the most interesting aspect of the new hovercraft from the point of view of the lawyer (and possibly from that of the rest of humanity also) is what kind of accidents we shall get with them. Thus it seems that they will not so much crash on to people, like aircraft, or run them over, like cars, as slice the tops off them. Perhaps they might be called " scythecraft " or " reapers."

" A. PRONEFELLOW."

London, E.C.4.

REVIEWS

The Principles of Company Law. By ROBERT R. PENNINGTON, LL.B., Solicitor. pp. xci and (with Index) 661. 1959. London: Butterworth & Co. (Publishers), Ltd. £2 10s. net.

In reviewing a recent edition of one of the well known works on company law, *The Times* described it as the only readable book on the subject. We thought at the time that this was hardly fair to at least one other author, but now that Mr. Pennington's book has been published it would be quite untenable.

Mr. Pennington is extremely readable and his book is one of the small number which, although written mainly for the student, are sufficiently practical and comprehensive to be used by the practitioner. It is a tribute to The Law Society examiners that such books should be called for by the Final Examination.

The book deals with all aspects of company law, including winding up, and there is a final chapter on Unit Trusts in which most solicitors will find something they did not know.

The historical introduction is short enough to be read by the busiest of us. It is interesting to find that in the seventeenth century there was a practice of buying what we should now call "shell" companies, the object being to avoid the expense of incorporation by royal charter or Act of Parliament.

All this is very good value for £2 10s. and not a page is wasted on reproducing material which the reader will already have at hand.

Judicial Review of Administrative Action. By S. A. DE SMITH, M.A., Ph.D. pp. xlvii and (with Index) 486. 1959. London: Stevens & Sons, Ltd. New York: Oceana Publications, Inc. £3 10s. net.

This scholarly book breaks entirely new ground, dealing as it does with the principles and scope of judicial review in English administrative law, and with the various judicial remedies whereby that review is exercised in practice. The learned author has brought a wealth of material to his subject, dealing with each aspect historically and then practically, and also citing many relevant decisions from the courts of the Commonwealth and the U.S.A. References to legal literature are also plentiful and critical, and the learned author has not hesitated to express his own views on doubtful points—of which there are many in this subject.

We are not altogether satisfied that the last word has been said on the exercise of a discretionary power for an improper purpose (p. 190 *et seq.*); we doubt whether the courts will go very far "in reading implied limitations into the grant of a statutory power" to an administrative authority. Also, is the implication that local authorities merit closer judicial control than the agencies of the Central Government (and *a fortiori*, we would have thought, the nationalised industries) really justified (see p. 19)? An action for a declaration may (possibly in the form of a relator action) be brought by a private individual having a sufficient interest, to ascertain the extent of the powers of a public authority (see, e.g., *Prescott* v. *Birmingham Corporation* [1954] 3 W.L.R. 990), and this might have been discussed on p. 384.

These are, however, but minor matters which occurred to one reader. There is a very great deal in this book; it should at once be placed on the "compulsory" reading list for university students and it will no doubt be resorted to and quoted in cases before the courts involving any question of judicial review. It is, however, a highly specialised book and, if this be a fault, it is almost over-burdened with authorities.

The book is well produced, although a line separating the text from the often very extensive footnotes would have been welcome, and can we put in yet another plea to these otherwise excellent publishers, to include full references in their table of cases? This is surely of special importance in a book of this calibre.

Land-Use Planning. By CHARLES M. HOAR. pp. xxxv and (with Index) 790. 1959. Boston, Massachusetts: Little, Brown & Co. $10.00 net.

The sub-title of this absorbing book is "A Casebook on the Use, Misuse and Re-use of Urban Land." As the preface says, it attempts to view American legal policies for urban land against a broad background. Part of this background is formed by English experience of particular problems.

The problems of planning are much the same the world over. This is evident from some of the headings in the Table of Contents, e.g.: "'*Sic Utere Tuo* . . .' Reconciliation by the Judiciary of Discordant Land Uses," "Nonconforming Uses," "Aesthetics, Property and the Comprehensive Plan," "The Riddle of Just Compensation" and "Fair Market Value."

How appropriate is the observation of Mr. Justice Sutherland in *Village of Euclid* v. *Ambler Realty Co.*, one of the cases included in the book, to these universal problems. "A nuisance may be merely a right thing in the wrong place—like a pig in the parlour instead of the farmyard."

But this is not just a collection of cases, including some English ones, but as well of legislative provisions, including sections of the Town and Country Planning Act, 1947, and of quotations from writers and journals and other interesting matter. The opening sentence of the first quotation under the heading "The Lawyer's Role" might well be pondered over by our present Minister of Housing and Local Government: "A law can be no better than its enforcement." But it is evident from succeeding paragraphs that it is not the enforcement of the law which is being criticised but the lawyers. "But there is also a fourth group of public servants who, from time to time, pour their own buckets of sand into the zoning gearbox. I speak of corporation counsels —city attorneys . . . There are altogether too many who neither know nor care." The reviewer hopes that these remarks do not also apply to the English corporation attorneys, of which he is one! But there is another more favourable comment quoted in the book: "Most of the favourable decisions on zoning appear to me to be the result of a clear expression of the ideas and principles in the minds of city planners by competent lawyers." This is an ideal to which we should all strive to attain.

The great interest of the book lies in the realisation that lawyers in planning on both sides of the Atlantic are having to work out common problems, but with very different machinery, and in a comparative study of the results. To every reader who is much concerned with planning law in this country the reviewer would commend this book as well worth reading. Indeed, it would make interesting reading for any solicitor concerned with real property.

Selected Planning Appeals. Second Series. Volume 1. Ministry of Housing and Local Government. pp. (with Index) 42. 1959. London: Her Majesty's Stationery Office. 2s. net.

These notes of cases, decided by the Minister during 1958, have been grouped in sections mainly according to the character of the proposal. Contrasting cases have been given in an effort to make clear the points on which a particular decision depended. For the same reason the location of each site is now given. Sections 1–5 are each prefaced by a brief statement of the Minister's general policy on the class of case in question.

1959 Index of Local Authorities in Hampshire and the Isle of Wight. pp. 22. 1959. Hampshire: The Hampshire Law Society. 2s. 6d. net.

The Hampshire Law Society is to be congratulated on its enterprise in compiling and publishing this useful index. All solicitors who have to make searches in the area covered will find possession of this booklet a great time-saver. If you have a client interested in purchasing a property in North Waltham, for instance, it is far from self-evident that searches should be made of the Basingstoke Rural District Council. Again, the correct destination for searches is quickly to be found in connection with properties at No Man's Land (Winchester Rural District) and Appledurcombe (Ventnor Urban District). Full postal addresses and telephone numbers are given of all the various county borough, non-county borough, urban and rural district offices. The production of the pamphlet is of a high standard with the names of the places clearly set out in alphabetical order in two sections, one for Hampshire and the other for the Isle of Wight. This index is a model of its kind and other local law societies would do well to emulate the example so effectively set by their colleagues in Hampshire.

Kime's International Law Directory, 1959. Edited by PHILIP W. T. KIME, O.B.E. Sixty-seventh year. pp. xiv and 538. 1959. Watford: Kime's International Law Directory, Ltd. 15s. net.

Between the covers of this convenient directory is to be found a list of legal practitioners in most of the principal towns throughout the world with a telegraphic code and appendix containing general legal information.

Seven Shares in a Goldmine. By MARGARET LARKIN. pp. x and 306. 1959. London: Victor Gollancz, Ltd. £1 1s. net.

On one fateful day in the autumn of 1952 the author and her daughter, Kathy, were flying to Oaxaco from Mexico City to visit friends, when a time bomb exploded in the baggage compartment tearing a 5-foot hole in the fuselage; prompt emergency action miraculously prevented any deaths. This book is devoted to giving a vivid account of the subsequent search, arrest and trial of the two suspected men with interests in some of the heavily insured passengers aboard the plane. The description of the trial is particularly well written and we found the account of the procedure under Mexican criminal law most interesting.

Brotherhood of Evil. The Mafia. By FREDERICK SONDERN, Jr. With a foreword by HARRY J. ANSLINGER. pp. xii and 243. 1959. London: Victor Gollancz, Ltd. £1 1s. net.

"Mafia" is a Sicilian word and is defined in the Shorter Oxford English dictionary as "the spirit of hostility to law and its ministers, often manifesting itself in vindictive crimes. Also, the body of those who share in this spirit." This is an apt description of this strange combine of Sicilian families which form part of the Sicilian secret society in the United States of America. In this book the author describes the historical origin of the brotherhood, its appearance in the United States, and its growth and activities from the Prohibition era to the present. We are told that to-day approximately 1,000 *mafiosi* virtually control the underworld, using the foulest of devices to maintain their grip on narcotics traffic, gambling, prostitution, and a host of legitimate enterprises. Finally, to use the author's own words, "this just *had* to be written. The brotherhood, although very powerful, is not as mysterious as it first appears, and if people know about its working we can eventually destroy it."

POINTS IN PRACTICE

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, London, E.C.4. They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Estate Duty—GIFT *Inter Vivos*—JOINT TENANCY—ONE-HALF OF VALUE OF HOUSE

Q. Within the last five years *A* bought the house of which he was then sitting tenant for £2,750. This price was less than its vacant possession value, which was about £3,500. He bought the house with a mortgage for £1,650 from a building society and the monthly repayments have consisted of both principal and interest in the ordinary way. The balance of the purchase money was found from his own resources only, but the property was conveyed to *A* and his wife as joint tenants. In the event of *A's* death within five years of the purchase, there will presumably be a claim for estate duty on the gift by *A* to his wife of one-half of the equity in the house. We are, however, not certain on what figure estate duty would be claimed: (1) whether one-half of the full vacant possession value at the death would be claimed as the appropriate value; (2) whether some (and, if so, what) allowance would be made for the fact that the purchase price was that for a sitting tenant; (3) whether one-half of the full amount of the original mortgage advance could be claimed as a deduction; (4) whether one-half of only the reduced amount owing on the mortgage could be claimed as a deduction; and (5) whether one-half of the monthly payments to the building society would also be regarded as gifts *inter vivos* and liable for duty.

A. *A* has had the house conveyed into the joint names of himself and his wife and that operates as an advancement to her of one-half of the beneficial interest therein. Accordingly, on his death within five years estate duty will be charged upon one-half of the value of the house in the condition in which it is at the date of his death. At the date of his death the house will be owner-occupied: therefore it will be valued on that basis and not subject to and with the benefit of any existing tenancy. It is not relevant that at an earlier stage, when *A* acquired the house, it was encumbered by his own sitting tenancy. In order to purchase the house, *A* borrowed money from a building society and secured it upon the fee simple. However it may have been secured, the primary liability to repay the building society lies upon *A* and it does not seem that the wife ever accepted any joint liability. Accordingly, nothing is deductible from the gift *inter vivos* on account of the mortgage debt but the whole of the then outstanding mortgage debt forms a deduction in the ordinary way from *A's* estate and this for the simple reason that *A* remains liable to the building society to discharge it. We do not think that there is any question of the monthly payments being regarded as gifts *inter vivos* because they merely go to reduce *A's* own liability.

Finance Act, 1958—SETTLEMENT CONTAINING POWER TO REVOKE AND RE-SETTLE

Q. We have never been able to understand the provisions of ss. 21 and 22 of the Finance Act, 1958, and should be very glad of your advice thereon. We are concerned with a case where a man made a settlement containing the power to revoke and re-settle and during his life he did partially revoke the settlement and re-settled part of the funds on his grandchild. The present trustees are the settlor's daughter and her husband, who have power under the settlement to revoke the remainder of the original settlement, but s. 404 of the Income Tax Act, 1952, only seems to apply when, in the event of the exercise of the power of revocation, the settlor or his spouse become beneficially entitled to the whole or any part of the property or the income arising therefrom, in which case the income was deemed to be the settlor's income. Can the 1958 Act have any effect after the death of the settlor and his spouse?

A. In general terms the Finance Act, 1958, s. 21, amends the Income Tax Act, 1952, s. 404, by equating a power to diminish, etc., with a power to determine. The Finance Act, 1958, s. 22, goes rather further and brings into the same general net settlements containing discretionary powers in favour of the settlor or the spouse of the settlor. In all these cases the underlying notion is that if the terms of the settlement are such that some part of the funds can or may in the future come back into the hands of the settlor or the spouse of the settlor the income of such part of the funds will be treated for income tax purposes as the income of the settlor. If the settlor is dead it does not matter that funds may still be payable to the spouse of the settlor because, if the settlor is dead, the income cannot be treated as his. *A fortiori* if the spouse of the settlor is also dead. In short, none of these provisions can have any operation after the death of the settlor.

Stamp Duty—DISSOLUTION OF ORAL PARTNERSHIP—ASSETS DIVIDED *In Specie*

Q. I am acting for three partners (a father and two sons) who are dissolving their oral partnership by mutual consent. The partnership has been carried on for a number of years under the firm name of "*X* & Sons." Part of the partnership assets consists of freehold property purchased out of partnership money and conveyed to them as partners trading as "*X* & Sons as part of their partnership property." It is proposed that on the winding-up the father shall take his share wholly in cash, and that each of the sons shall take their respective shares partly in freeholds and partly in cash. The freeholds are, of course, being valued. I should be glad to have your views on the question of stamp duties on transfer of the freeholds to each of

the sons. My view is that this is not a sale and purchase in the ordinary sense which attracts *ad valorem* stamp duty, but a partition of property between co-owners, and that the legal estate can be effectively transferred by a partition deed (executed in duplicate) which attracts only a 10s. stamp, and 5s. on the duplicate. If it can be dealt with in this way it will save a large sum in stamp duty. The father is giving up business entirely. The sons will become individual traders.

A. There is no suggestion that anyone should pay cash into the partnership funds in order that he might draw out some additional part of the partnership property *in specie*: if there had been there might have been some suggestion that there was a sale and purchase. All that is proposed is that the partnership assets should be divided *in specie*, some partners taking land, some partners perhaps taking chattels and some partners taking money. We agree with you that this is a partition and the instrument effecting that partition is sufficiently stamped with 10s. The authority for this is *Macleod* v. *Inland Revenue Commissioners* (1885), 12 R. (Ct. of Sess.) 1045.

Home-made Will—Gift to Attesting Witnesses

Q. We have a home-made will which appears to be valid and reads as follows: "I wish to leave my money to my brother George his wife Ruth and his daughter Jennifer and twenty pounds to my three God-children [naming them]." There was no residuary gift, but the deceased's estate consisted entirely of bank balance and National Savings Certificates, and would, therefore, be covered by the description "money." Unfortunately, George and Ruth attested the will. Jennifer is a minor. Under the circumstances will there be a partial intestacy as to two-thirds of the estate or will Jennifer take the whole?

A. The three take jointly since there is nothing in the will to displace the *prima facie* presumption to this effect. See Halsbury, 2nd ed., vol. 34, p. 354 *et seq.*, and the authorities there referred to. Consequently, since George and Ruth forfeit their interests by witnessing the will, Jennifer becomes solely entitled to all the estate. See *Re Fleetwood* (1880), 15 Ch. D. 594.

Husband and Wife—Desertion—Title to Property

Q. A husband deserted his wife two years ago and is now living abroad, his whereabouts being unknown. The husband owns a house in this country subject to a mortgage and in which his wife and children now reside. The wife pays the monthly mortgage instalments. Can she take any steps to ensure that she is given due credit for these repayments? The husband at about the time of leaving his wife made it clear that if the house were sold, the wife could have the balance of the proceeds of sale. If the house were sold the mortgage would in fact absorb the proceeds of sale and the wife would have nowhere to live. She therefore desires to remain in the house and if possible to have it transferred to her. There is, however, no means of communicating with the husband requesting him to do this. Can anything be done for the wife to safeguard her position with regard to the house and the monthly mortgage repayments which she is making?

A. We think that this matter can best be dealt with by the wife making an application under s. 17 of the Married Women's Property Act, 1882, whereby a judge may, in the event of a question arising between husband and wife as to the title to any property, make such order as he shall think fit. A recent example of the making of such an application is *Silver* v. *Silver* [1958] 1 All E.R. 523, a case in which many of the leading authorities were reviewed, and guidance as to the procedure to be followed on making an application under s. 17 may be found in Halsbury's Laws of England, 3rd ed., vol. 19, pp. 898–902. *Cf.* also Hames' Applications under s. 17 of the Married Women's Property Act, 1882.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

Judicial Committee of the Privy Council

COMPANY: SALE OF SHARES: HONEST BELIEF IN UNTRUE REPRESENTATIONS

Akerhielm and Another *v.* De Mare and Others

Lord Keith of Avonholm, Lord Jenkins, the Rt. Hon. L. M. D. de Silva. 1st June, 1959

Appeal from the Court of Appeal for Eastern Africa.

In a circular letter signed by the appellants which, the respondents alleged, induced them to subscribe for shares in a private company formed in Kenya for the purpose of manufacturing "cold process" tiles, it was stated, *inter alia*, "(*b*) We have procured the patent rights for most countries in Africa, India and Pakistan," and "(*c*) About one-third of the capital has already been subscribed in Denmark." The company having gone into liquidation and the whole of the shareholders' money having been lost, the respondents brought this action against the appellants, alleging that representations (*b*) and (*c*) were fraudulent misrepresentations and claiming damages. The trial judge held that both representations were untrue, but that the appellants honestly believed them to be true at the time they were made, and, applying *Derry* v. *Peek* (1889), 14 App. Cas. 337, dismissed the action. On appeal, the Court of Appeal for Eastern Africa hesitated to hold that representation (*b*) was false, and declined to hold that it was made fraudulently; they found that representation (*c*) was untrue, but reversed the trial judge's finding that the appellants honestly believed it to be true, and awarded damages. The appellants appealed.

Lord Jenkins, giving the judgment, said that assuming that representation (*b*) was not wholly true, there was no sufficient reason for disturbing the concurrent findings of the courts below in favour of the appellants on that point. As to representation (*c*), the word "subscribed" in the circular letter did not mean that one-third of the capital had already been subscribed in *cash*; consistently with the representation, formation expenses of the company and the acquisition of patent rights could be met by allotting fully paid shares. In all the circumstances, the Court of Appeal were not justified in reversing the trial judge's view, formed after seeing and hearing the first appellant give evidence, that he did honestly believe representation (*c*) to be true (see as to this *The Hontestroom* [1927] A.C. 37; *Watt or Thomas* v. *Thomas* [1947] A.C. 484; *Yuill* v. *Yuill* [1945] P. 15, 19; *Benmax* v. *Austin Motor Co., Ltd.* [1955] A.C. 370). Even assuming that the Court of Appeal were justified in substituting their own conclusion on the question of honest belief, they had adopted a wrong method of approach in that they construed the language of representation (*c*) as they thought it should be construed according to the ordinary meaning of the words, and held that, on the facts known to the appellants, it was impossible that either of them could ever have believed the representation as so construed to be true. The question was not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it, albeit erroneously, when it was made. (For the general proposition that regard must be had to the sense in which a representation is understood by the person making it, see *Derry* v. *Peek*, *supra*, *Angus* v. *Clifford* [1891] 2 Ch. 449, and *Lees* v. *Tod* (1882), 9 Rettie 807, 854, which authorities must, in their lordships' view, be preferred to *Arnison* v. *Smith* (1889), 41 Ch. D. 348, so far as inconsistent with them.) Lastly, where a defendant had been acquitted of fraud in a court of first instance the decision should not be displaced on appeal except on the clearest grounds (see *Glasier* v. *Rolls* (1889), 42 Ch. D. 436, 457). Appeal allowed. The respondents must pay the costs of this appeal and the appeal to the Court of Appeal for Eastern Africa.

Appearances: *H. A. P. Fisher* (*Clifford-Turner & Co.*); *Roger Willis* (*Gordon Dadds & Co.*).

[Reported by Charles Clayton, Esq., Barrister-at-Law]

Chancery Division

ADVANCEMENT OF MOIETY OF INFANT'S EXPECTANT SHARE IN TRUST FUND ON TRUSTS OF NEW SETTLEMENT: WHETHER VALID EXERCISE OF POWER OF ADVANCEMENT

***In re* Pilkington's Will Trusts; Pilkington and Others *v.* Pilkington and Another**

Danckwerts, J.

14th May, 1959

Adjourned summons.

By his will dated 14th December, 1934, a testator directed his trustees to hold his residuary estate upon trust in equal shares for all his nephews and nieces, the trustees to apply the income of their shares for their maintenance, education, support or benefit and to accumulate the balance until the beneficiaries attained twenty-five years, or being female married under that age during their lives and after their death on trust as to capital and future income for such of their children as they should appoint. Subject to that the income was to be held upon protective trusts for the benefit of the beneficiaries with a provision that their consent to any exercise of any applicable power of advancement should not cause a forfeiture of their interests: the will contained no provision replacing or excluding the power of advancement contained in s. 32 of the Trustee Act, 1925. The testator died on 8th February, 1935. One of his nephews, who had attained twenty-five years of age, was married and had three infant children. His second child, a daughter, was born on 29th December, 1956, and the trustees for the purpose of avoiding death duties desired to exercise the statutory power of advancement in her favour by applying up to one moiety of her expectant share in the testator's trust fund by adding it to a fund which it was proposed should be subject to the trusts of a new settlement, under which the income of the fund was to be applied for her maintenance until she attained twenty-one, and from then until she attained thirty was to be paid to her, when the capital was to be held on trust for her absolutely. The trustees took out this summons to determine whether they might lawfully so exercise the power of advancement.

DANCKWERTS, J., said that it was a proper exercise of a power of advancement for the benefit of a named person if it was made upon terms which were for the benefit of that person, or in the form of a settlement for that person's benefit. Here there were benefits to be found because of the question of payment of death duties in certain events. The exercise of a power of advancement took the fund right out of the trust estate and devoted it to the benefit of some person who held it clear of the limiting trusts of the settlement under which the power was exercised. It was different in that respect from the exercise of a power of appointment which merely marked the trusts of the settlement or will in question, so that the operation of the power was to be read into the settlement or will. The exercise of a power of advancement was not objectionable if it was in the form of providing benefits for the objects of the power coupled with a settlement of the sum so raised and allocated in such a way that the children or remoter issue would become beneficiaries under the settlement. Again, a settlement with discretionary powers, particularly if they were of a reasonable kind, was quite proper. A further conclusion was that in effect it was a resettlement of the money which was taken right out of the original settlement in the will: for the purposes of the rule against perpetuities the relevant period and purposes were those contained in the proposed settlement. It was not so tied up with the original will that the proposed provision was obnoxious to the rule against perpetuities and the trustees had a right to exercise the power of advancement in the manner proposed. Declaration accordingly.

APPEARANCES: *B. L. Bathurst*, Q.C., and *James Cunliffe; John Pennycuick*, Q.C., and *Eric Griffith* (*Alsop, Stevens & Co.*, Liverpool).

[Reported by Miss J. F. LAMB, Barrister-at-Law]

SETTLEMENT: WHETHER TRUST FOR PAYMENTS TO DISCOVERERS OF CAUSE AND CURE FOR CANCER CHARITABLE: WHETHER TRUSTEES' POWER OF REVOCATION AND NEW APPOINTMENT VALID

***In re* Watson's Settlement Trusts; Dawson and Another *v.* Reid and Others**

Roxburgh, J. 1st June, 1959

Adjourned summons.

By a settlement dated 4th December, 1931, a settlor directed his trustees, *inter alia*, to hold certain shares in a company upon trust after his death for the benefit of his wife, his four children, his grand-children and certain named persons, as they might in their discretion by deed, without infringing the rule against perpetuities, at any time before the death of the settlor appoint. In default of and subject to such appointment the shares were to be held on trust for division among certain named charities. Under the trusts concerning one of these charities the trustees were to pay the income from the shares to the treasurer of the British Empire Cancer Campaign to be applied for the general purposes of research work in cancer until the campaign should notify the trustees that " the cause of cancer " had been disovered and arbiters were satisfied that this was so, when the trustees were to sell all or some of the shares as they thought fit and pay the proceeds to the discoverers; the income of the balance of the shares, if any, was to continue to be paid to the campaign until it notified the trustees that " a cure for cancer " had been discovered and that arbiters were satisfied that this was so, when the trustees were to sell such of the shares as they thought fit and pay the proceeds to the discoverers. Subject to this the campaign shares were to be held on trust for Dr. Barnardo's Homes. Clause 7 of the settlement empowered the trustees at their discretion by deed revocable or irrevocable to revoke any of the trusts in respect of shares not beneficially vested in possession, and to direct that the shares should be held upon such other trusts for the benefit of such persons (other than the settlor and his wife) or charitable purposes as they thought fit. The settlor was alive at the date of this summons. Two of the original trustees died in 1941 and 1945 respectively. The original trustees and the trustees for the time being had at different times, pursuant to cl. 7, executed deeds of revocation and new appointment. The present trustees took out the summons to determine whether the power of revocation and new appointment was exercisable only by the original trustees or by the trustees from time to time, and if the latter, whether the power was void for remoteness.

ROXBURGH, J., reading his judgment, said that as a matter of construction generally in the settlement and in particular in the revocation clause the word " shares " referred to the shares in the capital of the company and not to shares of the beneficiaries in the trust fund. That excluded the possibility of severing the power as between one share in the corpus of the trust fund and another. His lordship also held that the power of revocation was not confined to the original trustees but extended to all duly appointed trustees throughout the duration of the settlement. The trusts of the Cancer Campaign share were wholly charitable and sufficiently certain; he did not envisage that arbiters would be unable to determine at some future date whether the cause of cancer had been discovered and a cure found. Moreover, the prizes were not a reward for past efforts but an incentive towards the relief of human suffering. If those conclusions were right that must be the end of the power of revocation because if indivisible it might continue to be exercised long after the period allowed by the rule against perpetuities. It had been argued that the power might be avoided as regards the Cancer Campaign share and a " wait and see " attitude be adopted towards the remaining shares. There was a distinction between a power which was in itself void and a power which was itself good although some particular exercise of it might be void. In the latter type of case it was permissible to wait and see how the power was in fact exercised, but to adopt such a course where the power itself was at stake was without precedent and would be contrary to traditional doctrine. His lordship held that the power was itself void *ab initio* because it was capable of being exercised beyond the period allowed by the rule against perpetuities and accordingly all the purported exercises of the power were void. Order accordingly.

APPEARANCES: *E. J. A. Freeman; E. I. Goulding; V. G. H. Hallett* (*Lawrence Jones & Co.*); *D. A. Thomas* (*Ranger, Burton & Frost*); *J. A. Brightman* (*Amery-Parkes & Co.*); *N. C. H. Browne-Wilkinson* (*Kingsford, Dorman & Co.*); *L. H. L. Cohen* (*Crossman, Block & Keith*).

[Reported by Miss J. F. LAMB, Barrister-at-Law]

Queen's Bench Division

LICENSING JUSTICES: BIAS

R. *v.* Barnsley Licensing Justices; *ex parte* Barnsley and District Licensed Victuallers' Association and Another

Lord Parker, C.J., Donovan and Salmon, JJ. 5th June, 1959

Application for an order of certiorari.

The applicants, the Barnsley and District Licensed Victuallers' Association and the Barnsley and District Off-Licence Holders' Protection Association, applied for certiorari to quash a decision of the Barnsley Licensing Justices granting to the Barnsley British Co-operative Society, Ltd., an application for a spirits off-licence at their central drug department. The grounds of the application were that one or more of the licensing justices who made the decision was a member of the co-operative society, and (*a*) had a financial interest therein and was thereby disqualified by s. 48 of the Licensing Act, 1953; (*b*) was thereby disqualified by bias.

LORD PARKER, C.J., delivering the judgment of himself and DONOVAN, J., said that a person having such a beneficial interest in the premises as s. 48 (4) of the 1953 Act prescribed might not act for any purpose under the Act in a case which concerned those premises; accordingly, the justices in the present case who were members of the society were disqualified from acting under subs. (4), and certiorari would lie. The matter, however, did not rest there because s. 48 (5) provided that: "No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification . . ." But all that subsection did was to oust the rule of law enunciated in *R.* v. *Rand* (1866), L.R. 1 Q.B. 230, and to make an applicant for certiorari prove a real likelihood of bias, whether by reason of pecuniary interest or otherwise. Here there was no suggestion of the likelihood of bias arising otherwise than from pecuniary interest. Apart from the small interest payable on any shares or deposits, the justices who were members of the society could, it was said, look forward to buying their spirits more cheaply than in an ordinary retail shop if they so wished. What happened, of course, was that at the end of the accounting period a member of a co-operative society received out of the profits of the society a dividend calculated, not upon shareholding, but upon total purchases. The effect was thus to reduce the cost of those purchases. It could not be said that that financial interest was so substantial as to give rise to a real likelihood of bias. Accordingly, their lordships would refuse the application.

SALMON, J. (dissenting), said that in order successfully to impugn the decision of the justices a real likelihood of bias must be established. Quite apart from the common-law presumption of bias from any pecuniary interest, that onus was discharged by establishing that there were real grounds on which ordinary right-thinking people might reasonably conclude that the decision might well have been biased. In such circumstances justice would not manifestly be seen to be done. His lordship found it impossible to hold that there were no real grounds on which ordinary right-thinking persons could reasonably conclude that the justices may well have had a bias in favour of granting the licence. Taking that view he doubted whether any question arose under s. 48 of the Act of 1953. Since s. 48 was not an empowering section or one which removed any disqualification, it left the common-law disqualification untouched, and this disqualification ran parallel with the statutory disqualification. Accordingly, subs. (5) saved any act which would otherwise be invalid by reason only of a disqualification under the statute, but it did not save an act done by a justice disqualified at common law. Application refused.

APPEARANCES: *H. C. Beaumont* (*Corbin, Greener & Cook*, for *J. Donald Driver*, Barnsley); *John McLusky* (*Batchelor, Fry, Coulson & Co.*, for *W. Winter*, Barnsley).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law]

Probate, Divorce and Admiralty Division

PRACTICE NOTE

HUSBAND AND WIFE: PRACTICE: AMENDING REPLY TO ALLEGE DESERTION IN ANSWER TO CROSS-PETITION

Thatcher *v.* Thatcher and Gill (Wheeler intervening)

Karminski, J. 27th May, 1959

Defended petition for divorce.

A respondent who had alleged adultery and cruelty in her answer was given leave to amend her answer by alleging "by way of cross-petition" that the petitioner had deserted her for a period of at least three years prior to a precise date which she specified. The petitioner, whose petition had been filed less than three years prior to the month in which it was common ground that the parties had separated, had denied the charges in the original answer, and had prayed for divorce on the ground of adultery. At the hearing, by which time well over three years had elapsed since the parties had separated, the counter-charges of adultery, and the charge of cruelty, were abandoned, and the petitioner applied for leave to amend his reply "by way of answer to the respondent's cross-petition" by alleging desertion for a period of at least three years prior to the presentation of the cross-petition. Reference was made in argument to *Robertson* v. *Robertson* [1954] 1 W.L.R. 1537.

KARMINSKI, J., said that the course proposed, though a novelty, seemed an excellent course to take which would save costs, and gave leave to amend accordingly. Leave to amend.

APPEARANCES: *Brian Neill* (*Champion & Co.*, for *Knight and Maudsley*, Maidenhead); *De Piro* and *C. French* (*Willmett & Co.*).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law]

WEEKLY LAW REPORTS: REFERENCES

The following page numbers can now be given in respect of notes of cases published on 26th June, 1959:—

Inland Revenue Commissioners *v.* Hinchy	3 W.L.R. 66
Sabey (Clifford) (Contractors), Ltd. *v.* Long	3 W.L.R. 59
Westgate *v.* Westgate	1 W.L.R. 729

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time:—

Colonial Development and Welfare Bill [H.L.] [23rd June.

To consolidate the Colonial Development and Welfare Acts, 1940 to 1959.

Read Second Time:—

British Transport Commission Bill [H.C.] [25th June.
Wages Councils Bill [H.L.] [23rd June.

Read Third Time:—

Dog Licences Bill [H.L.] [23rd June.
Finsbury Square Bill [H.L.] [25th June.
London County Council (General Powers) Bill [H.L.] [22nd June.

In Committee:—

Fatal Accidents Bill [H.C.] [25th June.
Landlord and Tenant (Furniture and Fittings) Bill [H.C.] [25th June.
Mental Health Bill [H.C.] [23rd June.
National Insurance Bill [H.C.] [25th June.
Obscene Publications Bill [H.C.] [22nd June.

HOUSE OF COMMONS

PROGRESS OF BILLS

Read First Time:—

Protection of Deer Bill [H.C.] [24th June.

To prohibit the hunting with hounds of deer; to provide for the control of deer by approved methods; and for purposes connected therewith.

Read Second Time:—

Education Bill [H.C.] [22nd June.
Licensing (Scotland) Bill [H.L.] [22nd June.
Milford Haven (Tidal Barrage) Bill [H.L.] [22nd June.
National Assistance Bill [H.C.] [24th June.

Read Third Time:—

Cotton Industry Bill [H.C.] [23rd June.
Post Office Works Bill [H.L.] [22nd June.

STATUTORY INSTRUMENTS

Argyll County Council (Carrick Burn, Carrick Castle) Water Order, 1959. (S.I. 1959 No. 1058.) 5d.

Argyll County Council (Eas Dubh, Lochgair) Water Order, 1959. (S.I. 1959 No. 1059.) 5d.

Ayr County Council (Paduff Burn) Water Order, 1959. (S.I. 1959 No. 1056.) 5d.

Bahrain Order, 1959. (S.I. 1959 No. 1035.) 1s. 5d.

Cayman Islands (Constitution) (Amendment) Order in Council, 1959. (S.I. 1959 No. 1045.) 4d.

Colonial Air Navigation (Amendment) Order, 1959. (S.I. 1959 No. 1051.) 4d.

Colonial Civil Aviation (Application of Act) (Amendment) Order, 1959. (S.I. 1959 No. 1052.) 5d.

County of Inverness (Allt Dubh and Lochan Dubh, Aviemore) Water Order, 1959. (S.I. 1959 No. 1057.) 5d.

County of Inverness (Loch Mhic Charmhicheil, Teangue) Water Order, 1959. (S.I. 1959 No. 1084.) 5d.

Exchange Control (Definition of Scheduled Territories) Order, 1959. (S.I. 1959 No. 1082.) 4d.

Export of Goods (Control) (Amendment) Order, 1959. (S.I. 1959 No. 1053.) 5d.

Foreign Compensation (Hungary) (Amendment) (No. 2) Order, 1959. (S.I. 1959 No. 1041.) 6d.

Haverfordwest-Milford Haven Trunk Road (Merlin's Bridge, near Haverfordwest, Diversion) Order, 1959. (S.I. 1959 No. 1030.) 5d.

International Wheat Council (Immunities and Privileges) Order, 1959. (S.I. 1959 No. 1040.) 5d.

Kuwait Order, 1959. (S.I. 1959 No. 1036.) 1s. 5d.

London Traffic (Prescribed Routes) Regulations:—
Deptford (No. 2). (S.I. 1959 No. 1080.) 4d.
Deptford (No. 3). (S.I. 1959 No. 1081.) 4d.
St. Marylebone (No. 3). (S.I. 1959 No. 1079.) 5d.

London (Waiting and Loading) (Restriction) (Amendment) (No. 2) Regulations, 1959. (S.I. 1959 No. 1076.) 5d.

Merchant Shipping Orders:—
Load Line Convention (Kuwait). (S.I. 1959 No. 1043.) 4d.
Safety Convention (Kuwait). (S.I. 1959 No. 1042.) 4d.

Muscat (Amendment) Order, 1959. (S.I. 1959 No. 1037.) 5d.

Nigeria Orders in Council:—
Constitution (Amendment No. 2). (S.I. 1959 No. 1049.) 9d.
Offices of Governor-General and Governors (Amendment No. 2). (S.I. 1959 No. 1050.) 5d.

Petty Sessional Divisions (Northamptonshire) Order, 1959. (S.I. 1959 No. 1054.) 6d.

Qatar Order, 1959. (S.I. 1959 No. 1038.) 1s. 5d.

Regulation of Movement of Swine Order, 1959. (S.I. 1959 No. 1029.) 6d.

St. Marylebone (Waiting and Loading) (Restriction) Regulations, 1959. (S.I. 1959 No. 1078.) 11d.

Sheffield-Grimsby Trunk Road (Laceby By-Pass Extension) Order, 1959. (S.I. 1959 No. 1065.) 5d.

Stopping up of Highways Orders:—
County of Buckingham (No. 6). (S.I. 1959 No. 1070.) 5d.
City and County Borough of Chester (No. 1). (S.I. 1959 No. 1016.) 5d.
County of Cornwall (No. 3). (S.I. 1959 No. 1071.) 5d.
County Borough of Great Yarmouth (No. 1). (S.I. 1959 No. 1017.) 5d.
County of Hampshire (No. 3). (S.I. 1959 No. 1072.) 5d.
County of Hampshire (No. 4). (S.I. 1959 No. 1066.) 5d.
County of Lancaster (No. 10). (S.I. 1959 No. 1019.) 5d.
County of Lancaster (No. 11). (S.I. 1959 No. 1012.) 5d.
County of Lancaster (No. 12). (S.I. 1959 No. 1073.) 5d.
County of Leicester (No. 5). (S.I. 1959 No. 1067.) 5d.
County of Lincoln, Parts of Kesteven (No. 4). (S.I. 1959 No. 1022.) 5d.
London (No. 23). (S.I. 1959 No. 1023.) 4d.
County of Oxford (No. 2). (S.I. 1959 No. 1018.) 5d.
County of Oxford (No. 3). (S.I. 1959 No. 1032.) 5d.
City and County Borough of Portsmouth (No. 5). (S.I. 1959 No. 1024.) 5d.
City and County Borough of Portsmouth (No. 6). (S.I. 1959 No. 1068.) 5d.
County Borough of Stockport (No. 1). (S.I. 1959 No. 1069.) 5d.
County of Surrey (No. 5). (S.I. 1959 No. 1025.) 5d.
County of York, East Riding (No. 3). (S.I. 1959 No. 1033.) 5d.

Tanganyika (Legislative Council) (Amendment) Order in Council, 1959. (S.I. 1959 No. 1048.) 5d.

Tanganyika Order in Council, 1959. (S.I. 1959 No. 1047.) 5d.

Town Development (Exchequer Contributions) (Scotland) Regulations, 1959. (S.I. 1959 No. 1063.) 6d.

Trinidad and Tobago (Constitution) (Amendment) Order in Council, 1959. (S.I. 1959 No. 1044.) 1s. 5d.

Trucial States Order, 1959. (S.I. 1959 No. 1039.) 1s. 5d.

Turks and Caicos Islands (Constitution) (Amendment) Order in Council, 1959. (S.I. 1959 No. 1046.) 4d.

Wages Regulation (Fur) Order, 1959. (S.I. 1959 No. 1027.) 1s.

Weedon-Atherstone-Brownhills Trunk Road (Wall By-Pass) Order, 1959. (S.I. 1959 No. 1031.) 5d.

Westminster (Waiting and Loading) (Restriction) (Amendment) Regulations, 1959. (S.I. 1959 No. 1077.) 5d.

Yorkshire Ouse River Board Orders:—
Alteration of Boundaries of the River Kyle Internal Drainage District. (S.I. 1959 No. 1028.) 5d.
Alteration of Boundaries of the Thornton Internal Drainage District and the Rye Internal Drainage District. (S.I. 1959 No. 1034.) 5d.

Zetland County Council (Burn of Trona-Scord, Sandness) Water Order, 1959. (S.I. 1959 No. 1055.) 5d.

SELECTED APPOINTED DAYS

June

14th House Purchase and Housing Act, 1959.
Housing (Underground Rooms) Act, 1959.
Restriction of Offensive Weapons Act, 1959.

July

1st Legal Aid (General) (Amendment No. 3) Regulations, 1959. (S.I. 1959 No. 1060.)
Patents (Amendment) Rules, 1959. (S.I. 1959 No. 259.)
Solicitors' Accounts (Amendment) Rules, 1959.

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertisement Offices: Oyez House, Breams Buildings, Fetter Lane, London, E.C.4. Telephone: CHAncery 6855.

Annual Subscription: Inland £4 10s., Overseas £5 (payable yearly, half-yearly or quarterly in advance).

Classified Advertisements must be received by first post Wednesday.

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